



Criminal Justice System Reforms

Revised 'Brimage' Guidelines Promote Fairness and Uniformity in Drug-Related Plea Agreements; New Policy Requires Electronic Recording of Statements by Homicide Suspects

By statute, the Attorney General has responsibility for even-handed treatment of the accused. In keeping with this commitment, the Attorney General's Office led key reforms of the criminal justice system in 2004. The Office generated new plea agreement guidelines to ensure greater fairness and uniformity in the sentencing of certain drug offenders, and it issued a new Interim Policy requiring the electronic recording of final statements made by certain criminal suspects to police investigators in a "station house" custodial setting.

Modification of Mandatory Minimum Sentences

The Attorney General's revised "Brimage Guidelines" were designed to address inequities related to plea negotiations and, ultimately, prison sentences involving certain drug offenders.

The Comprehensive Drug Reform Act of 1987 (CDRA) gave prosecutors discretion to expose certain drug offenders to stiff "mandatory minimum" prison sentences. Specifically, those accused of either distributing illegal drugs within 1,000 feet of a school, or possessing drugs with intent to distribute within 1,000 feet of a school, faced a mandatory sentence of three years in prison with no possibility of parole or early release.

In 1998, however, the New Jersey Supreme Court found in **State v. Brimage** that the statutory scheme of CDRA was unconstitutional. Specifically, the Court found that each County Prosecutor's Office adopted its own plea offers and policies, resulting in a

lack of statewide uniformity and disparity in sentencing across the State.

As a result, the Court called on the Attorney General's Office to promulgate uniform statewide guidelines to address its concerns. The guidelines were subsequently created, but a lack of proportionality remained.

For example, the 1998 guidelines did not address the reality that low-level "school zone" offenders — including those with no significant record of prior convictions — faced mandatory minimum prison terms, as well as a period of ineligibility for parole or early release.

The guidelines also failed to address inequities resulting from geography. For example, in most urban centers — because there are almost no areas outside of 1,000 feet of a school — drug offenders in the inner-city were more likely to be found operating in a school zone than their suburban counterparts. Thus, the same conduct resulted in different treatment based solely upon the geography of the offense.

Since significant minority populations tend to live in urban centers, a disproportionate number of minority persons ended up pleading guilty to "school zone" crimes and being sentenced to harsh, mandatory minimum prison terms while identical drug crimes committed in the suburbs were drawing more lenient sentences.

Developed by the Attorney General in consultation with the presiding judges of the Criminal Part of the Superior Court, defense lawyers, the New Jersey Public Defender's



Office, and the 21 County Prosecutors, the revised Brimage Guidelines issued in 2004 seek to ensure greater proportionality, and to make certain that punishment genuinely fits the crime.

The guidelines exempt from the regular Brimage calculation certain school zone cases involving less egregious drug offenders. They also reflect the law enforcement community's support for New Jersey's Drug Court Program by allowing prosecutors to opt for drug treatment for certain offenders instead of mandatory imprisonment.

More egregious drug offenders will not fare as well under the new guidelines, as tougher punishment is required for certain defendants. Some examples: defendants proven to be engaged in street gang activity, those shown to have used a firearm or carried one, those who were involved in "commercial" drug sales, and those who returned to the scene of a prior drug crime in violation of a "Drug Offender Restraining Order" issued by a judge.

Electronic Recording of Statements by the Accused

Also in 2004, the Attorney General's Office and the 21 County Prosecutors promulgated an amended policy regarding the electronic recording of station house confessions.

This is the first time in the nation that electronic recording has been directed by an Attorney General, and New Jersey is only the fifth state to mandate electronic recording of statements.

The Amended Policy expands the requirements of an earlier-issued Interim Policy that called on police investigators to record — audiotape or videotape — the final statements of homicide suspects discussing their crimes with police in a station house custodial setting. The new, Amended Policy requires that, by September 1, 2005, police electronically record the final written statements — or acknowledgments of final statements — by all criminal suspects accused of first or second degree offenses. By January 1, 2006, that electronic recording requirement will be further expanded to cover all suspected third-degree offenders. Also, as of January 2006, police will be required to electronically record the same material for all juveniles suspected of committing any act that would constitute a crime under statute [NJSA 2A:4A-26a(2)(a)], thereby subjecting the juvenile to waiver to adult court on the prosecutor's motion.

The main purpose of the Attorney General's Amended Policy on electronic recording is to protect the rights of suspects — and the integrity of criminal investigations — by creating a permanent and objective record as a suspect provides his or her final statement.

The goal of the policy is to verify that the statement is voluntarily made, and that the text of the statement is accurate when presented in court.

Such an audio and/or video record can establish whether a suspect was properly advised of his or her Constitutional rights. It can also establish what the suspect actually said.

When a final statement is signed or acknowledged by a criminal suspect in custody and no electronic recording has been made, police are required under the new guidelines to document the reason why. "Excused" reasons might include that the recording equipment was not working or was unavailable, or that the suspect indicated a desire not to be electronically recorded.

The Attorney General's Amended Policy on electronic recording of suspects coincides, approximately, with similar recommendations by the New Jersey Supreme Court. In a report issued on April 15, 2005, the Supreme Court's Special Committee on Recordation of Custodial Interrogations recommended that the Supreme Court exercise its supervisory authority over the criminal justice system to encourage the recording of all custodial interrogations relating to first and second degree violent crimes, as well as a few other offenses.

The Special Committee's proposed rule applies to interrogations conducted in a place of detention at a point where Miranda warnings must be given. The Special Committee's recommended timetable to begin electronic recording of interrogations is as follows: January 1, 2006 for all homicides, and January 1, 2007 for all other eligible crimes. According to the Special Committee, the remedy for an "unexcused" failure by law enforcement to record eligible suspects is that the trial judge will consider the absence of a recording as a factor in its admissibility analysis, and the jury is to be instructed about the failure.